

Consideration of filings with respect to *Anchor Holdings, LLC, et al., v. Department of Natural Resources and Howard*, Administrative Cause No. 14-049W:

- Claimants' Motion to Index Agreed Order
- Respondent Department of Natural Resources' Objection to and Response to Claimants' Motion to Index Agreed Order
- Claimants' Response to Department of Natural Resource's Objection to and Response to Claimant's Motion to Index Agreed Order
- Division Director's Recommendation Regarding Inclusion of Agreed Order in CADDNAR

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

FILED
JUN 16 2014
NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

IN THE MATTER OF:

RANDALL L. TOBIAS; and SARGENT H P LLC,)	
Claimants,)	
	)	Administrative Cause
vs.	)	Number: 14-050W
)	
DEPARTMENT OF NATURAL RESOURCES,)	
Respondent.)	
)	
	)	(PL-22421)
)	

MOTION TO INDEX AGREED ORDER

Claimants, would show the Commission:

1. This matter was an appeal of the denial of two permits by the Department of Natural Resources which resulted in the entry of an Agreed Order approved by the Commission May 19, 2014.
2. The Agreed Order contains an agreement among the parties concerning the interplay of I.C. 14-26-2-5 and I.C. 14-15-3-17.
3. As a part of the Agreed Order, the parties mutually agreed that I.C. 14-15-3-17 limits the operations of a motor boat within 200 feet of the shoreline of a public freshwater lake to those activities stated in that statute.
4. The agreement among the parties and the resultant Agreed Order resolves a long standing issue concerning activities in Lake Wawasee adjacent to the properties in question owned by the Claimants.
5. The Agreed Order has significant precedential value in that it contains an acknowledge by the Department of Natural Resources that I.C. 14-15-3-17 limits the operation of a motorboat within 200 feet of the shoreline of a public freshwater lake.

WHEREFORE, Claimants move the Commission for an order causing the Agreed Order in this matter to be indexed in CADDNAR and for all other proper relief.

SNYDER MORGAN ^{LLP}

By: 

Stephen R. Snyder, #413-43
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574-457-3300
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Attorney for Randall L. Tobias and
Sargent H P LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on the 16 day of June, 2014, a true and correct copy of the foregoing pleading was served upon the following by first class U.S. mail, postage prepaid:

Eric L. Wyndham, Esq.
Andrew J. Wells, Esq.
Office of Legal Counsel
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W295
Indianapolis, IN 46204



Stephen R. Snyder

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

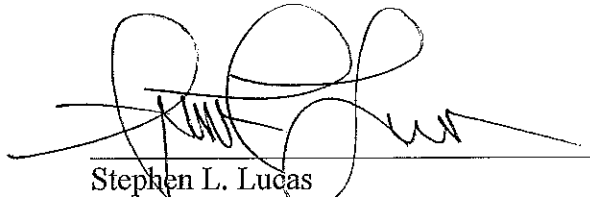
IN THE MATTER OF:

ANCHOR HOLDINGS LLC; RANDALL J.)	
TOBIAS; and SARGENT H P LLC;	)	Administrative Cause
Claimants,	)	Number: 14-049W
)	
vs.)	
)	
DEPARTMENT OF NATURAL RESOURCES,	)	(PL-22429 and PL-22421)
Respondent.)	

NOTICE OF FINAL ORDER OF THE NATURAL RESOURCES COMMISSION

You are notified the Natural Resources Commission adopted the attached "Agreed Order" as its final order. The Commission is the ultimate authority, and the action is its final determination. A person that wishes to seek judicial review must file a petition for review in appropriate court within 30 days of this notice and must otherwise comply with IC 4-21.5-5. Service of a petition for judicial review is also governed by 312 IAC 3-1-18.

Dated: May 21, 2014



Stephen L. Lucas
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2200

(317) 233-3322

A copy of the foregoing was sent to the following:

Stephen R. Snyder
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Attorneys at Law
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Andrew J. Wells
Office of Legal Counsel
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W272
Indianapolis, IN 46204

cc: Lori Schnaith, DNR Division of Water
Linnea Petercheff, DNR Division of Fish and Wildlife
Captain Gary Whitaker, DNR Division of Law Enforcement

1. The Natural Resources Commission (“Commission”) is the ultimate authority of the Department of Natural Resources (“Department”), an agency of the State of Indiana duly empowered, pursuant to IC 14-26-2-23 to regulate the excavation, placement of fill, or the placement, modification, or repair of a temporary or permanent structure over, along, or lakeward of the shoreline or waterline of a public freshwater lake.
2. The Commission has jurisdiction over both the subject matter and the parties to this Cause.

3. IC 14-26-1-23(a)(1) provides that unless a person obtains a permit from the Department under that section and conducts the activities according to the terms of the permit, that person may not conduct the following activities over, along, or lakeward of the shoreline or waterline of a public freshwater lake: (A) excavate; (B) place fill; or (C) place, modify, or repair a temporary or permanent structure. IC 14-26-2-23(b) provides that an application for such a permit must be accompanied by a nonrefundable fee of one hundred dollars (\$100); a project plan that provides the Department with sufficient information concerning the proposed excavation, fill, temporary structure, or permanent structure; and a written acknowledgment from the landowner that any additional water area created under the project plan is part of the lake and is dedicated to the general public use with the public rights described in IC 14-26-2-5.

4. The Department shall issue a permit after investigating the merits of the application for a permit. In determining the merits of the application, the Department may consider any factor, including the cumulative effects of the proposed activity upon: (1) the shoreline, waterline, or bed of the lake; (2) the fish, wildlife, or botanical resources; (3) the public rights described in IC 14-26-2-5; (4) the management of watercraft operations under IC 14-15; and (5) the interests of a landowner having property rights abutting the lake or rights to access the lake. IC 14-26-2-23(c).

5. The Natural Resources Commission has authority to adopt rules under IC 4-22-2 to assist in the administration of IC 14-26-2 (the Lakes Preservation Act); provide objective standards for issuing permits under IC 14-26-2-23, including standards for the configuration of piers, boat stations, platforms, and similar structures. IC 14-26-2-23(e)(2)(B) provides that the Commission shall adopt rules to exempt any class of activities from licensing, including temporary structures, if the Commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in IC 14-26-2-5.

6. 312 IAC 11-1 through 312 IAC 11-5 provide standards with respect to activities along and within public freshwater lakes. 312 IAC 11-3-1 is a codified rule adopted by the Commission providing for general licenses for qualified temporary piers and similar temporary structures. 312 IAC 11-3-1(a)(1) provides that the placement and maintenance of a temporary structure is authorized without a written license issued by the Department under IC 14-26 and that rule if the temporary structure qualifies under that rule. In order for the temporary structure to qualify for a general license, it must (1) be easily removable, (2) not infringe on the access of an adjacent landowner to the public freshwater lake, (3) not unduly restrict navigation, (4) not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake, (5) not extend more than one hundred fifty (150) feet from the shoreline or water line, (6) if a pier, not extend over water that is continuously more than six (6) feet deep to a distance of one hundred fifty (150) feet from the shoreline or water line, (7) not be a marina, (8) not be a group pier, and (9) be placed by a riparian owner or with the written approval of a riparian owner.

7. A public freshwater lake is defined as a lake that has been used by the public with the acquiescence of a riparian owner, but excludes Lake Michigan, a lake lying wholly or in part within the corporate boundaries of any of the three (3) cities having the largest population in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000) , and a privately owned body of water used for the purpose of, or created as a result of surface coal mining. IC 14-26-2-4 and 312 IAC 11-2-17.

8. Lake Wawasee located in Kosciusko County, Indiana, is a public freshwater lake.

9. IC 14-15-3-17 provides:

Sec. 17. (a) A person operating a motorboat may not approach or pass within two hundred (200) feet of the shore line of a lake or channel of the lake at a place or point where the lake or channel is at least five hundred (500) feet in width, except for the purpose of trolling or for the purpose of approaching or leaving a dock, pier, or wharf or the shore of the lake or channel.

10. On November 26, 2013, Claimants filed their respective Permit Applications for Construction with the Department of Natural Resources by which each Claimant requested permits to place 6 posts, each less than 3.5" in diameter in the lake bottom of Lake Wawasee extending to approximately 3.5' above the legal lake level, 186 feet from the shoreline, each supporting a sign reading, "Mooring or anchoring a boat within 200 feet of this shoreline is illegal. IC 14-15-3-17".

11. On February 28, 2014, the Department denied each Permit Application for the following reasons:

- (a) Indiana Code 14-26-2-5, provides in subsection (c)(1) that the natural resources and the natural scenic beauty (see Note below for definitions) of Indiana are a "public right", and in (c)(2) that the public of Indiana has a "vested right" in the (A) preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state; and (B) the right to use the public freshwater lakes for recreational purposes (see Note below for definitions). Subsection (d) provides that the state has (1) full power and control of all the public freshwater lakes in Indiana, and (2) holds and controls all public freshwater lakes in trust for the use of all the citizens of Indiana for recreational purposes. Subsection (e) provides that a person owning land bordering a public freshwater lake does not have the "exclusive right to the use of the waters of the lake or any part of the lake". These provisions do not allow the Department to authorize or give the appearance of authorizing the blocking off of any portion of the public freshwater lake for private use.
- (b) There is no statutory prohibition against the mooring or anchoring of boats within 200 feet of the shoreline of a public freshwater lake.
- (c) The project would create a navigational hazard for the boating public; articles placed in the water have the potential to cause damage to persons or property and the placement of such articles would create an unforeseen hazard; the placement of (6) posts that would extend 3.5 feet above the waterline would create a substantial hazard to the public.

- (d) Note: The Lakes Preservation Act (IC 14-26-2) defines “natural resources” as the “water, fish, plant life, and minerals in a public freshwater lake.” IC 14-26-2-2; “Natural scenic beauty” means the natural condition as left by nature without manmade additions or alterations”, IC 14-26-2-5(a); and “recreational purpose” means fishing, boating, swimming, the storage of water to maintain water levels, and any other purpose for which lakes are ordinarily used and adapted, IC 14-26-2-5(b)

12. On February 28, 2014, Claimants filed their respective Petitions for Administrative Review appealing the denial of their Permit Applications.

13. This matter was assigned to Administrative Law Judge Stephen L. Lucas, who issued his Notice of Prehearing Conference pursuant to the Administrative Orders and Procedures Act, IC 4-21.5 and administrative rules codified under 312 IAC 3-1. Judge Lucas set the matter for prehearing conference on April 17, 2014 in Columbia City, Indiana at the DNR Northeast Regional Headquarters.

14. On March 11, 201, Department attorneys Eric L. Wyndham and Andrew J. Wells entered their Joint Appearance for the Department.

15. Judge Lucas conducted the prehearing conference on April 17, 2014. The companion actions were consolidated into this case. The parties indicated the possibility of settlement existed and that discussions were ongoing. The parties agreed that proper notice had been issued to adjacent owners at the time the permit applications were filed and notice requirements had been met. The parties also indicated that it was agreed that any information marker within the lake would be by buoy rather than on a sign post. The parties indicated there was no agreement concerning the language to be placed on a buoy. A telephone status conference was scheduled for May 12, 2014 at 9:00 am.

16. The parties have engaged in settlement negotiations and have mutually arrived at an agreement:

- a. IC 14-26-2-5 is limited by the provisions of IC 14-15-3-17.

b. IC 14-15-3-17 limits the operation of a motorboat within 200 feet of the shoreline of a public freshwater lake to those activities stated in the statute.

c. The use of buoys rather than posts eliminates any navigational hazard to the boating public and Claimants have agreed to the use of buoys.

17. The parties hereby agree to the following Order:

ORDER

IT IS HEREBY AGREED AND ORDERED THAT:

1. Claimants are permitted to place buoys 175 feet from their respective shorelines which buoys may contain signs with language as proposed by Claimants. The buoys shall be of a material that, if struck by a watercraft, will cause little or no damage. Buoys may be placed not less than twenty (20) feet apart and may extend the full length of Claimants' properties. Buoys may be in place at all times when there is open water, but shall be removed from the lake prior to the formation of ice.

2. If placed in accordance with paragraph 1 above, no permit from the Department is required for placement of the buoys.

3. The receipt and acceptance of this Agreed Order by the parties, by the placing of the authorized signatures thereof shall be considered as acceptance of the terms set forth herein.

4. If any further dispute or disagreement arises between the parties concerning the issues resolved in this Agreed Order, the matter shall first be determined within the Department of Natural Resources, with the parties having all rights under IC 4-21.5 to obtain administrative review of that determination.

5. The person(s) signing below for and on behalf of any of the parties in any official or lawful position of representation or office has the full authority and power to sign this Agreed


Order for and on behalf of the party entity of which he or she represents and to fully bind this Agreed Order to that respective party. This Order may be signed by electronic or facsimile signatures which shall constitute original signatures.

6. The terms contained in this document are the entire and complete agreement among the parties in resolution of this action.

7. This Agreed Order shall have no force or effect until approved by the Commission.

AGREED ORDER APPROVAL

CLAIMANTS:



RANDALL L. TOBIAS

DATE: May 12, 2014

ANCHOR HOLDINGS, LLC

BY: _____
ANASTASIOS PARAFESTAS, MEMBER

DATE: _____

SARGENT HOUSE PARTNERS, LLC

BY: 

RANDALL L. TOBIAS, MEMBER

DATE: May 12, 2014

Order for and on behalf of the party entity of which he or she represents and to fully bind this Agreed Order to that respective party. This Order may be signed by electronic or facsimile signatures which shall constitute original signatures.

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AGREED ORDER APPROVAL

CLAIMANTS:

RANDALL L. TOBIAS

DATE: _____

ANCHOR HOLDINGS, LLC

BY: 
ANASTASIOS PARAFESTAS, MANAGER

DATE: 5/12/14


SARGENT HOUSE PARTNERS, LLC

BY: _____
RANDALL L. TOBIAS, MEMBER

DATE: _____

**RESPONDENT
DEPARTMENT OF NATURAL
RESOURCES**

BY: _____


CHRIS SMITH,
Deputy Director

DATE: _____

5/13/2014




ANDREW J. WELLS,
Attorney No. 29545-49
Legal Counsel
Department of Natural Resources

DATE: _____

5/13/2014

**APPROVED FOR LEGALITY AND
FORM:**



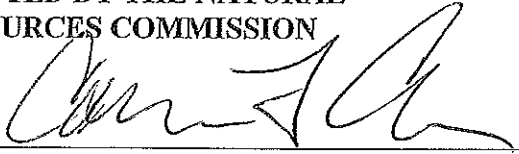
STEPHEN L. LUCAS,
Administrative Law Judge

DATE: _____

May 16, 2014

**ADOPTED BY THE NATURAL
RESOURCES COMMISSION**

BY: _____


CAMERON CLARK
Secretary

DATE: _____

5/19/14

FILED

JUN 24 2014

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

**NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS**

IN THE MATTER OF:

ANCHOR HOLDINGS LLC; RANDALL L. TOBIAS;)	
and SARGENT H P LLC,	)	Administrative Cause
Claimants,	)	Number: 14-050W
)	
vs.)	
)	
DEPARTMENT OF NATURAL RESOURCES,	)	(PL-22421)
Respondent.)	

**RESPONDENT DEPARTMENT OF NATURAL RESOURCES' OBJECTION TO AND
RESPONSE TO CLAIMANTS' MOTION TO INDEX AGREED ORDER**

Comes now the Respondent Department of Natural Resources ("Department"), by counsel, and hereby submits its objection to and response to the Claimants' Motion To Index the Agreed Order entered into by the parties in the above-entitled administrative proceeding and approved by the Natural Resources Commission, and in support thereof states as follows:

1. The Claimants seek to have the Agreed Order (i.e. agreement) entered into by and between them and the Department, and approved by the Natural Resources Commission ("Commission") indexed into the Commission's contested administrative decisions case data base (or "CADDNAR").

2. "CADDNAR" is an acronym for "Contested Administrative Decisions of the Department of Natural Resources".

3. The matter before the Administrative Law Judge of the Commission in this proceeding was concluded by an agreement between the parties in this Cause, and there is nothing in the Agreed Order that the terms thereof are or were to be applicable to the general public or indexed in CADDNAR when the parties reached and entered into the agreement.

4. It has been the practice of the Commission not to include Agreed Orders, or agreements reached between individual parties, in resolution of administrative proceedings to be indexed or placed in CADDNAR for general application.

5. The Claimants chose not to take this matter to a contested administrative hearing or summary judgment whereby evidence would be received and considered absent an agreement of the parties and findings of fact, conclusions of law, and a final order would be entered deciding a contested matter.

6. The Department disagrees that the Agreed Order entered into in this Cause creates any notable precedential value or significance whatsoever applicable to the public generally or at-large. If the parties desired that the resolution be of precedential application and placed or indexed into CADDNAR, the matter should have been taken to a contested administrative hearing or such language should have been placed in the Agreed Order itself when it was entered into and executed. It was not, and the Department objects to the Agreed Order entered into and approved in this proceeding being indexed or placed into CADDNAR after-the-fact.

WHEREFORE, The Department of Natural Resources objects to the Agreed Order entered into and approved in this Cause (14-050W) being placed in or indexed in CADDNAR, and requests that the Administrative Law Judge of the Commission and/or the Commission enter an order denying the Claimants' Motion To Index Agreed Order filed in this Cause, and for all other just and proper relief in the premises.

Respectfully submitted,



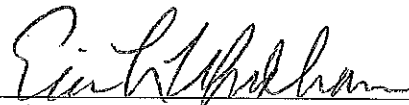
Eric L. Wyndham, #1393-11
Attorney for Respondent Department of
Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on the 24th day of June, 2014, on the following:

Stephen R. Snyder
SNYDER MORGAN LLP
200 West Main Street
Syracuse, IN 46567

cc: Lori Schnaith, Division of Water
Linnea Petercheff, Division of Fish and Wildlife
Captain Gary Whitaker, Division of Law Enforcement



Eric L. Wyndham
Office of Legal Counsel
Department of Natural Resources
402 W. Washington St., Room W295
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Fax: (317) 232-1550
ewyndham@dnr.in.gov

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

FILED

JUL 11 2014

IN THE MATTER OF:

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

ANCHOR HOLDINGS LLC; RANDALL L. TOBIAS;)
and SARGENT H P LLC,)
Claimants,)

Administrative Cause
Number: 14-049W

vs.)

DEPARTMENT OF NATURAL RESOURCES,)
Respondent.)

(PL-22429 and PL-22421)

RESPONSE TO DEPARTMENT OF NATURAL RESOURCE'S
OBJECTION TO AND RESPONSE TO
CLAIMANTS' MOTION TO INDEX AGREED ORDER

STATEMENT OF FACTS

The matters at issue in this proceeding were initiated by the Claimants with the filing of Permit Applications with the Department of Natural Resources ("DNR") on November 26, 2013. On February 28, 2014, the DNR denied Claimants' applications and specifically stated:

- (2) There is no statutory prohibition against the mooring or anchoring of boats within 200 feet of the shoreline of a public freshwater lake.

Claimants contested the basis for the denial, in particular, Denial Reason No. 2 quoted above. A prehearing conference was held before Administrative Law Judge Stephen L. Lucas on April 17, 2014, at which time both actions were consolidated into the present action. At all times during the present proceedings, Claimants have contested the administrative action by the DNR which resulted in the denial of the two permit applications.

The parties subsequently entered into an Agreed Order, a copy of which is attached hereto as Exhibit A, which was expressly adopted as the "final order" of the Natural Resources Commission ("Commission") effective May 19, 2014. Notice of the Agreed Order, as the

Commission's final order, was issued on May 21, 2014 with no person thereafter timely seeking judicial review. In the Agreed Order, as adopted by the Commission, the parties specifically agreed in pertinent part as follows:

- a. IC 14-26-2-5 is limited by the provisions of IC 14-15-3-17.
- b. IC 14-15-3-17 limits the operation of a motorboat within 200 feet of the shoreline of a public freshwater lake to those activities stated in the statute.

The Order then allowed Claimants to place buoys 175 feet from the shoreline containing language which indicated that anchoring a motorboat within 200 feet of the shore is illegal.

Claimants have now asked that the Agreed Order, as the Commission's adopted final order, be indexed in the database of agency decisions required by IC 4-21.5-3-32. The DNR has objected to Claimants' request.

ARGUMENT

The Administrative Orders and Procedures Act, adopted by the Indiana Legislature in 1986, states:

Sec. 32. (a) Each agency shall make all written final orders available for public inspection and copying under IC 5-14-3. The agency shall index final orders that are issued after June 30, 1987, by name and subject.

...

IC 4-21.5-3-32(a) (emphasis added).

The Commission, in response to the requirements contained in the above section, established "CADDNAR". The Commission described the adoption of CADDNAR in Information Bulletin #1 (Second Amendment) dated October 11, 2006 which superseded Information Bulletin #1 published at 13 IR 1938. Included within the CADDNAR database, as noted in Information Bulletin #1 (Second Amendment), are decisions "following hearing or summary judgment (or involuntary dismissal, where a noteworthy point of law is considered)." The bulletin goes on to state, "In addition, upon the request of the parties, settlement agreements are included that have notable precedential value." A copy of Information Bulletin #1 (Second Amendment) is attached as Exhibit B.

Information Bulletin #1 (Second Amendment) is in conflict with the provisions of IC 4-21.5-3-32. The statute requires the indexing of "final orders" and does not limit the indexing to

only those orders issued subsequent to a hearing or summary judgment or certain agreed orders considered to have "notable precedential value" by the parties thereto. While the Commission's apparent decision not to index all agreed orders may provide it a more efficient indexing method, that discretion was not given to the Commission by the State Legislature. The Legislature clearly mandated that all "final orders" issued by the Commission be indexed.

The Administrative Orders and Procedures Act defines "order" as follows:

Sec. 9. "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. The term includes:

- (1) A license; or
- (2) A determination under IC 4-21.5-3-6(a)(3) or IC 4-21.5-3-6(a)(4).

IC 4-21.5-1-9.

There is no question that the Agreed Order issued in this matter falls squarely within the definition of "Order" under IC 4-21.5-1-9. The definition of "Order" does not distinguish between an order issued following a hearing or summary judgment and an agreement of the parties to the proceeding expressly adopted by an agency as its final order. The Commission is without discretion to refuse to index in the CADDNAR database the Agreed Order, as expressly adopted by the Commission as its final order in this matter.

Additionally, Information Bulletin #1 (Second Amendment) provides for the indexing of settlement agreements which have notable precedential value. The Agreed Order contains specific findings and conclusions, which cannot, by any stretch of interpretation, be limited solely to the parties to this action. Claimants have maintained throughout this action that the provisions of IC 14-15-3-17 limit the actions of persons operating motorboats within 200 feet of the shoreline of a public freshwater lake. That statute reads:

Sec. 17. (a) A person operating a motorboat may not approach or pass within two hundred (200) feet of the shore line of a lake or channel of the lake at a place or point where the lake or channel is at least five hundred (500) feet in width, except for the purpose of trolling or for the purpose of approaching or leaving a dock, pier, or wharf or the shore of the lake or channel.

IC 14-15-3-17(a).

This statute clearly places limits on boating activities within 200 feet of the shoreline and those activities encompass the general rights of the public to utilize public freshwater lakes for "recreational purposes." See IC 14-26-2-5 (defining "recreational purposes" to include

"Boating" and separately declaring the public's right to use public freshwater lakes "for recreational purposes."). Ind. Code 14-26-2, commonly referred to as the Lake Preservation Act, was originally adopted in 1947. The Legislature originally adopted the limiting provisions of IC 14-15-3-17 in 1957. Clearly, the limiting language contained in the subsequent statute was intended to restrict the activities of motorboats on public lakes that had been granted in 1947. When two statutes appear to be in conflict, the more specific statute will control. The language in Ind. Code 14-15-3-17 is more specific than the language contained in the Lake Preservation Act and will control. *See, e.g., Robinson v. Wroblewski*, 704 N.E.2d 467 (Ind.1998).

The DNR chooses to object to the indexing of this matter on the basis that nothing contained in the Agreed Order states that "the terms thereof are or were to be applicable to the general public." The DNR's position in this regard cannot be sustained when the issues involve two statutory provisions, the effects of which cannot be argued as being applicable only to Claimants in this matter. The legislative provisions in question apply to all public freshwater lakes and any persons operating motorboats on those public freshwater lakes.

The acknowledgment in the Agreed Order by the DNR and the Commission that IC 14-15-3-17 limits the operation of a motorboat within 200 feet of the shoreline of a public freshwater lake to those activities stated in the statute (trolling or approaching or leaving a dock or the shore) has great precedential significance. It is presumed that legislatures do not enact a useless provision, see *Henshaw v. Bd. of Comm'rs of Jay Cty.*, 611 N.E.2d 637 (Ind. 1993), and that presumption must be applied to the limiting provisions of Section 17. Limiting the operation of a motorboat within 200 feet of the shore of a lake is justified on numerous bases, including protection of swimmers, preservation of shallow lake areas, avoiding navigation hazards such as lawfully placed docks, and minimizing shoreline erosion. Proper enforcement of this limiting provision, which would result from establishing precedent, would be in furtherance of the legislative intent.

CONCLUSION

Ind. Code 4-21.5-3-32 requires the indexing in CADDNAR of all final orders of the Natural Resources Commission regardless of whether those orders are as a result of a summary judgment, hearing or agreement. Additionally, the Agreed Order in this matter has significant precedential value as it relates to the enforcement of legislative provisions which have been in

effect for over 50 years. The Agreed Order, as adopted by the Commission as its final order, should be indexed in CADDNAR pursuant to Claimants' request and as otherwise required by IC 4-21.5-3-32.

SNYDER MORGAN LLP


By: 

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Attorney for Randall L. Tobias and
Sargent H P LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on the 11th day of July, 2014, a true and correct copy of the foregoing pleading was served upon the following by first class U.S. mail, postage prepaid:

Eric L. Wyndham, Esq.
Office of Legal Counsel
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W295
Indianapolis, IN 46204


Stephen R. Snyder

3. IC 14-26-1-23(a)(1) provides that unless a person obtains a permit from the Department under that section and conducts the activities according to the terms of the permit, that person may not conduct the following activities over, along, or lakeward of the shoreline or waterline of a public freshwater lake: (A) excavate; (B) place fill; or (C) place, modify, or repair a temporary or permanent structure. IC 14-26-2-23(b) provides that an application for such a permit must be accompanied by a nonrefundable fee of one hundred dollars (\$100); a project plan that provides the Department with sufficient information concerning the proposed excavation, fill, temporary structure, or permanent structure; and a written acknowledgment from the landowner that any additional water area created under the project plan is part of the lake and is dedicated to the general public use with the public rights described in IC 14-26-2-5.

4. The Department shall issue a permit after investigating the merits of the application for a permit. In determining the merits of the application, the Department may consider any factor, including the cumulative effects of the proposed activity upon: (1) the shoreline, waterline, or bed of the lake; (2) the fish, wildlife, or botanical resources; (3) the public rights described in IC 14-26-2-5; (4) the management of watercraft operations under IC 14-15; and (5) the interests of a landowner having property rights abutting the lake or rights to access the lake. IC 14-26-2-23(c).

5. The Natural Resources Commission has authority to adopt rules under IC 4-22-2 to assist in the administration of IC 14-26-2 (the Lakes Preservation Act); provide objective standards for issuing permits under IC 14-26-2-23, including standards for the configuration of piers, boat stations, platforms, and similar structures. IC 14-26-2-23(e)(2)(B) provides that the Commission shall adopt rules to exempt any class of activities from licensing, including temporary structures, if the Commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in IC 14-26-2-5.

6. 312 IAC 11-1 through 312 IAC 11-5 provide standards with respect to activities along and within public freshwater lakes. 312 IAC 11-3-1 is a codified rule adopted by the Commission providing for general licenses for qualified temporary piers and similar temporary structures. 312 IAC 11-3-1(a)(1) provides that the placement and maintenance of a temporary structure is authorized without a written license issued by the Department under IC 14-26 and that rule if the temporary structure qualifies under that rule. In order for the temporary structure to qualify for a general license, it must (1) be easily removable, (2) not infringe on the access of an adjacent landowner to the public freshwater lake, (3) not unduly restrict navigation, (4) not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake, (5) not extend more than one hundred fifty (150) feet from the shoreline or water line, (6) if a pier, not extend over water that is continuously more than six (6) feet deep to a distance of one hundred fifty (150) feet from the shoreline or water line, (7) not be a marina, (8) not be a group pier, and (9) be placed by a riparian owner or with a the written approval of a riparian owner.

7. A public freshwater lake is defined as a lake that has been used by the public with the acquiescence of a riparian owner, but excludes Lake Michigan, a lake lying wholly or in part within the corporate boundaries of any of the three (3) cities having the largest population in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000) , and a privately owned body of water used for the purpose of, or created as a result of surface coal mining. IC 14-26-2-4 and 312 IAC 11-2-17.

8. Lake Wawasee located in Kosciusko County, Indiana, is a public freshwater lake.

9. IC 14-15-3-17 provides:

Sec. 17. (a) A person operating a motorboat may not approach or pass within two hundred (200) feet of the shore line of a lake or channel of the lake at a place or point where the lake or channel is at least five hundred (500) feet in width, except for the purpose of trolling or for the purpose of approaching or leaving a dock, pier, or wharf or the shore of the lake or channel.

10. On November 26, 2013, Claimants filed their respective Permit Applications for Construction with the Department of Natural Resources by which each Claimant requested permits to place 6 posts, each less than 3.5" in diameter in the lake bottom of Lake Wawasee extending to approximately 3.5' above the legal lake level, 186 feet from the shoreline, each supporting a sign reading, "Mooring or anchoring a boat within 200 feet of this shoreline is illegal. IC 14-15-3-17".

11. On February 28, 2014, the Department denied each Permit Application for the following reasons:

- (a) Indiana Code 14-26-2-5, provides in subsection (c)(1) that the natural resources and the natural scenic beauty (see Note below for definitions) of Indiana are a "public right", and in (c)(2) that the public of Indiana has a "vested right" in the (A) preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state; and (B) the right to use the public freshwater lakes for recreational purposes (see Note below for definitions). Subsection (d) provides that the state has (1) full power and control of all the public freshwater lakes in Indiana, and (2) holds and controls all public freshwater lakes in trust for the use of all the citizens of Indiana for recreational purposes. Subsection (e) provides that a person owning land bordering a public freshwater lake does not have the "exclusive right to the use of the waters of the lake or any part of the lake". These provisions do not allow the Department to authorize or give the appearance of authorizing the blocking off of any portion of the public freshwater lake for private use.
- (b) There is no statutory prohibition against the mooring or anchoring of boats within 200 feet of the shoreline of a public freshwater lake.
- (c) The project would create a navigational hazard for the boating public; articles placed in the water have the potential to cause damage to persons or property and the placement of such articles would create an unforeseen hazard; the placement of (6) posts that would extend 3.5 feet above the waterline would create a substantial hazard to the public.

- (d) Note: The Lakes Preservation Act (IC 14-26-2) defines "natural resources" as the "water, fish, plant life, and minerals in a public freshwater lake." IC 14-26-2-2; "Natural scenic beauty" means the natural condition as left by nature without manmade additions or alterations", IC 14-26-2-5(a); and "recreational purpose" means fishing, boating, swimming, the storage of water to maintain water levels, and any other purpose for which lakes are ordinarily used and adapted, IC 14-26-2-5(b)

12. On February 28, 2014, Claimants filed their respective Petitions for Administrative Review appealing the denial of their Permit Applications.

13. This matter was assigned to Administrative Law Judge Stephen L. Lucas, who issued his Notice of Prehearing Conference pursuant to the Administrative Orders and Procedures Act, IC 4-21.5 and administrative rules codified under 312 IAC 3-1. Judge Lucas set the matter for prehearing conference on April 17, 2014 in Columbia City, Indiana at the DNR Northeast Regional Headquarters.

14. On March 11, 201, Department attorneys Eric L. Wyndham and Andrew J. Wells entered their Joint Appearance for the Department.

15. Judge Lucas conducted the prehearing conference on April 17, 2014. The companion actions were consolidated into this case. The parties indicated the possibility of settlement existed and that discussions were ongoing. The parties agreed that proper notice had been issued to adjacent owners at the time the permit applications were filed and notice requirements had been met. The parties also indicated that it was agreed that any information marker within the lake would be by buoy rather than on a sign post. The parties indicated there was no agreement concerning the language to be placed on a buoy. A telephone status conference was scheduled for May 12, 2014 at 9:00 am.

16. The parties have engaged in settlement negotiations and have mutually arrived at an agreement;

- a. IC 14-26-2-5 is limited by the provisions of IC 14-15-3-17.

b. IC 14-15-3-17 limits the operation of a motorboat within 200 feet of the shoreline of a public freshwater lake to those activities stated in the statute.

c. The use of buoys rather than posts eliminates any navigational hazard to the boating public and Claimants have agreed to the use of buoys.

17. The parties hereby agree to the following Order:

ORDER

IT IS HEREBY AGREED AND ORDERED THAT:

1. Claimants are permitted to place buoys 175 feet from their respective shorelines which buoys may contain signs with language as proposed by Claimants. The buoys shall be of a material that, if struck by a watercraft, will cause little or no damage. Buoys may be placed not less than twenty (20) feet apart and may extend the full length of Claimants' properties. Buoys may be in place at all times when there is open water, but shall be removed from the lake prior to the formation of ice.
2. If placed in accordance with paragraph 1 above, no permit from the Department is required for placement of the buoys.
3. The receipt and acceptance of this Agreed Order by the parties, by the placing of the authorized signatures thereof shall be considered as acceptance of the terms set forth herein.
4. If any further dispute or disagreement arises between the parties concerning the issues resolved in this Agreed Order, the matter shall first be determined within the Department of Natural Resources, with the parties having all rights under IC 4-21.5 to obtain administrative review of that determination.
5. The person(s) signing below for and on behalf of any of the parties in any official or lawful position of representation or office has the full authority and power to sign this Agreed


Order for and on behalf of the party entity of which he or she represents and to fully bind this Agreed Order to that respective party. This Order may be signed by electronic or facsimile signatures which shall constitute original signatures.

6. The terms contained in this document are the entire and complete agreement among the parties in resolution of this action.

7. This Agreed Order shall have no force or effect until approved by the Commission.

AGREED ORDER APPROVAL

CLAIMANTS:



RANDALL L. TOBIAS

DATE: May 12, 2014

ANCHOR HOLDINGS, LLC

BY: _____
ANASTASIOS PARAFESTAS, MEMBER

DATE: _____

SARGENT HOUSE PARTNERS, LLC

BY: 

RANDALL L. TOBIAS, MEMBER

DATE: May 12, 2014

Order for and on behalf of the party entity of which he or she represents and to fully bind this Agreed Order to that respective party. This Order may be signed by electronic or facsimile signatures which shall constitute original signatures.

6. The terms contained in this document are the entire and complete agreement among the parties in resolution of this action.

7. This Agreed Order shall have no force or effect until approved by the Commission.

AGREED ORDER APPROVAL

CLAIMANTS:

RANDALL L. TOBIAS

DATE: _____

ANCHOR HOLDINGS, LLC

BY: 
ANASTASIOS PARAFESTAS, MANAGER

DATE: 5/12/14

SARGENT HOUSE PARTNERS, LLC

BY: _____
RANDALL L. TOBIAS, MEMBER


DATE: _____

RESPONDENT
DEPARTMENT OF NATURAL
RESOURCES

BY: 


CHRIS SMITH,
Deputy Director

DATE: 5/13/2014


ANDREW J. WELLS,
Attorney No. 29545-49
Legal Counsel
Department of Natural Resources

DATE: 5/13/2014

APPROVED FOR LEGALITY AND
FORM:


STEPHEN L. LUCAS,
Administrative Law Judge

DATE: May 16, 2014

ADOPTED BY THE NATURAL
RESOURCES COMMISSION

BY: 

CAMERON CLARK
Secretary

DATE: 5/19/14

NATURAL RESOURCES COMMISSION
Information Bulletin #1 (Second Amendment)

SUBJECT: Establishment of Division of Hearings; Indexing of Final Adjudicative Agency Decisions; Transcript Fees. To be noted, the information outlined here supersedes Information Bulletin #1 published at 13 IR 1938.

ESTABLISHMENT OF THE DIVISION OF HEARINGS

The Department of Natural Resources is among those state agencies that are governed by IC 4-21.5 (sometimes called the "administrative orders and procedures act" or the "administrative adjudication act") and IC 4-22 (rule adoption). The Indiana General Assembly has provided that effective July 1, 1990, all hearings required by IC 4-21.5 and IC 4-22 for the Department will be conducted on behalf of the Natural Resources Commission. See IC 14-10-2-3 and IC 14-34-2-2.

To assist in the separation of the hearings functions from other legal functions of the Department of Natural Resources, the Natural Resources Commission has, by resolution, established under IC 14-10-2-2 a "division of hearings." The Commission approved the resolution on January 25, 1990. As required by statute, the resolution was considered and approved by the Governor on April 27, 1990 and became effective July 1, 1990.

The resolution provides in part: "The division of hearings is established, under the natural resources commission, to be coordinated by the chief administrative law judge: (1) to conduct hearings and proceedings relative to the administrative adjudication act, the rule adoption act, the conservancy district act, and as otherwise specified by the commission; and (2) to provide assistance to the commission and the other boards of the department in seeking to conform with the legal requirements for the conduct of their meetings."

The current offices of the Division of Hearings are located at Indiana Government Center-South, 402 West Washington Street, Room W272, Indianapolis, Indiana. The telephone number is (317) 232-4699.

INDEXING OF FINAL ADJUDICATIVE AGENCY DECISIONS

The administrative adjudication act provides in IC 4-21.5-3-32 that an agency shall index and make available all written final orders for public inspection and copying. In addition to providing better communications to the regulated public, this provision acknowledges that an agency may utilize an indexed order as precedent. The sanction applicable to an agency that does not index its orders is that the agency generally may not use nonindexed orders as precedent.

The Division of Hearings maintains a database on the Internet, called "CADDNAR." Accessible through CADDNAR are decisions rendered by the Commission following the completion of a contested proceeding. Included are those following hearing or summary judgment (or involuntary dismissal, where a noteworthy point of law is considered). In addition, upon the request of the parties, settlement agreements are included that have notable precedential value. CADDNAR includes all such decisions since 1978, when the agency began regularly assigning adjudicatory cases to administrative law judges. An attempt is made to track the history of individual decisions taken on judicial review to a circuit or superior court or on appeal. CADDNAR is a searchable database available on-line at the Natural Resources Commission Homepage at http://www.in.gov/cgi-bin/nrc/decision_list.pl.

During its meeting of November 22, 1988, the Natural Resources Commission, by resolution, adopted CADDNAR as the agency index under IC 4-21.5-3-32 for final orders of the Department of Natural Resources. The Commission also specified that material included in CADDNAR may be used as precedent for actions controlled by the administrative adjudication act.

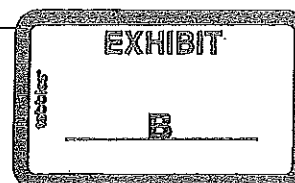
Use of CADDNAR was first acknowledged by the Indiana Court of Appeals in Peabody Coal v. Indiana DNR, (1994 Ind. App.), 692 N.E.2d 925. Subsequent reported decisions have also acknowledged CADDNAR.

TRANSCRIPT FEES

Under the administrative adjudication act, the party that initiates judicial review of a final agency order is generally responsible for the costs of transcript preparation. As provided in IC 4-21.5-5-13(d), the agency "shall charge" the person seeking judicial review "with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court." The statutory subsection also clarifies that preparation costs include more than copying expenses.

The Natural Resources Commission has adopted 312 IAC 3 to assist in its implementation of the administrative adjudication act. 312 IAC 3-1-14 governs court reporters and transcripts. Subsection (c) provides, in part, that the "party who requests a transcript. . . shall pay the cost of the transcript: (1) as billed by the court reporting service; or (2) if the transcript is prepared by an employee of the commission, as determined from time to time by the commission on a per page basis after consideration of all expenses incurred in the preparation of the transcript."

The Natural Resources Commission at its March 24, 1998, meeting has determined the per page basis for a transcript prepared by an employee of the Commission according to the 1988 resolution. "The Natural Resources Commission resets the fee for transcript preparation at \$3.80 per page."



Posted: 10/11/2006 by Legislative Services Agency
An [html](#) version of this document.

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

ANCHOR HOLDINGS LLC; RANDALL L.)	
TOBIAS and SARGENT HP LLC,)	
Claimants,	)	Administrative Cause
vs.	)	Number: 14-049W
)	
DEPARTMENT OF NATURAL RESOURCES,	)	(PL-22429 and PL-22421)
Respondent.)	

**RECOMMENDATION REGARDING
INCLUSION OF AGREED ORDER IN CADDNAR**

Status of Proceeding

This matter arises from a "Motion to Index Agreed Order" filed on behalf of the Claimants on June 16, 2014. The "Agreed Order" which is the subject of the motion includes signatures of the attorneys of record and the administrative law judge and was approved by the Secretary of the Commission on May 19, 2014. The "Respondent Department of Natural Resources' Objection to and Response to Claimants' Motion to Index Agreed Order" was filed on June 24, 2014. The Claimants filed their "Response to Department of Natural Resources' Objection to and Response to Claimants' Motion to Index Agreed Order" on July 11, 2014. These documents and a copy of the "Agreed Order" would be included with materials submitted to the AOPA Committee.

The Director of the Division of Hearings provides background and offers recommendations to the AOPA Committee to assist with disposition of the "Motion to Index Agreed Order". Because the division director is making recommendations, in contrast to an administrative law judge issuing a nonfinal order following adjudication, the parties are not required to file objections to gain consideration by the AOPA Committee.

Commission Indexes

Indexing of Commission orders issued under IC 4-21.5 ("AOPA") is considered in "Establishment of the Division of Hearings; Indexing of Final Adjudicative Agency Decisions; Transcript Fees", Natural Resources Commission Information Bulletin #1 (Third Amendment), 20120321-IR-312120148NRA, IND. REG. (March 21, 2012). Bulletin #1 states:

AOPA provides in IC 4-21.5-3-32 that an agency shall index and make available all written final orders for public inspection and copying. In addition to providing better communications to the regulated public, this provision acknowledges an agency may utilize an indexed order as precedent.

Information Bulletin #1 recognizes two categories of indexed orders. The first category is posted on the Commission's website with a searchable database known as "CADDNAR".

Accessible through CADDNAR are decisions rendered by the Commission following the completion of a contested proceeding. Included are those following: (1) hearing; (2) summary judgment; or, (3) involuntary dismissal, if a noteworthy point of law is considered. Upon request of the parties, agreed orders may be included if they address novel legal issues. CADDNAR includes all Commission decisions since 1978 when the agency began regularly assigning proceedings to administrative law judges. Histories are provided for decisions taken on judicial review to a circuit or superior court or on appeals....

In a resolution approved on November 22, 1988, the Commission adopted CADDNAR as the agency index under IC 4-21.5-3-32 for DNR agency actions. The Commission also specified that decisions in CADDNAR may be used for a proceeding under AOPA.

CADDNAR includes approximately 663 decisions.

The second category of indexed orders recognized by Information Bulletin #1 is agreed orders.

The Division of Hearings also maintains a database of AOPA agreed orders. These are organized alphabetically on recordable discs and are available for viewing and copying.

Approximately 542 agreed orders have been assembled with signatures attached beginning in or about 1991. An Excel spreadsheet lists the decisions. A person may request and receive a copy of an agreed order by U.S. mail or email.

The "Agreed Order" entered in this proceeding is included in the second category of indexed agreed orders but is not included in CADDNAR. The Claimants have requested its inclusion in CADDNAR. The DNR does not join (in fact, opposes) the request.

Division Director Analyses and Recommendations

Indexing of agency decisions under AOPA is anticipated by IC 4-21.5-3-32. Currently, the Commission applies a two-tiered approach for indexing through Information Bulletin #1 (a nonrule policy document). The Commission should review and determine the propriety of any modification and reflect (or decline to reflect) the modification through Information Bulletin #1.

The prerogative for how Natural Resources Commission decisions are indexed rests at the agency level with the Commission. To apply otherwise would violate the necessity for administrative exhaustion. As the entity most-directly responsible for administration of AOPA, however, the AOPA Committee may properly provide guidance to the Commission as a whole. The Commission determination should be made in a public meeting governed by the Open Door Law.

In implementing a review of Information Bulletin #1, legal issues are presented. An information bulletin cannot violate state statute. Here both IC 4-21.5-3-32 and IC 4-21.5-3-27(c) apply. They must be construed together. IC 4-21.5-3-32 provides an agency shall index and make available all written final orders for public inspection and copying.

IC 4-21.5-3-27(c) was added subsequently and has particular application to AOPA decisions construing IC 13, IC 14, and IC 25. Section 27(c) provides that conclusions of law “must consider prior final orders (*other than negotiated orders*)” when a disposition is entered under IC 13, IC 14, or IC 25. Emphasis supplied by division director.

The final order here construed provisions in IC 14. The vast majority of proceedings decided by the Commission (whether through its AOPA Committee or through the administrative law judge) construe IC 14 or IC 25. The statutory structure does not preclude a separate indexing of decisions following non-negotiated orders (in other words, following a contested proceeding) and decisions following negotiated orders (in other words, through an agreed order). Indeed, a failure to provide separate indexing of dispositions following contested proceedings and those following agreed orders may violate the legislative structure.

Apart from the statutory structure, the automatic inclusion of agreed orders within CADDNAR could have adverse consequences. (1) A motivating factor in entering an agreed order may be a party's desire to avoid the precedent resulting from reporting in CADDNAR. (2) In this agency, a DNR permitting action is frequently at issue. The agreed order may become the de jure permit for an applicant. Many DNR permits authorize construction activities which must be conducted within a limited period. Slowing the time for review of agreed orders may not serve the interests of an applicant. (3) Settlements are generally favored by the courts. Particularly with the emphasis upon mediation, and the possibility a mediated settlement may step outside Commission jurisdiction, the inclusion of some agreed orders in CADDNAR can narrow the ability to achieve a negotiated settlement. (4) An administrative law judge does not typically participate in drafting an agreed order. Because an agreed order does not have the status of a CADDNAR precedent, the administrative law judge can now approve promptly if the agreed order appears lawful within the context of the proceeding. An agreed order may only touch upon or decline to consider central legal issues. If elevated to the level of a CADDNAR precedent, the administrative law judge may be compelled to conduct an evidentiary hearing to ascertain the likely consequences for future proceedings.

The challenges of Item (4) are illustrated by this proceeding. The Claimants urge on pages 4 and 5 of their "Response to Department of Natural Resource's Objection to and Response to Claimants' Motion to Index Agreed Order":

Ind. Code 14-26-2, commonly referred to as the Lake Preservation Act, was originally adopted in 1947. The Legislature originally adopted the limiting provides of IC 14-15-3-17 in 1957. Clearly, the limiting language contained in the subsequent statute was intended to restrict the activities of motorboats on public lakes that had been granted in 1947. When two statutes appear to be in conflict, the more specific statute will control. The language in Ind. Code 14-15-3-17 is more specific than the language contained in the Lakes Preservation Act and will control.

The Claimants present a cogent argument in their response, but the argument is not part of the Agreed Order and is by no means axiomatic. The absence of the argument from the "Agreed Order" underlines the informality of agreed orders and a risk with providing them general application.

A contrary argument to the Claimants is that had the legislature intended to amend the Lake Preservation Act in its 1957 enactment (today sometimes called the "Boating Code" (IC 14-15)), the legislature would have simply amended the Lake Preservation Act. The Boating Code governs activities on all "public waters". These include every "lake, river, stream, canal, ditch, or body of water" that is (1) subject to the jurisdiction of the state or (2) owned or controlled by a public utility. IC 14-8-2-226. IC 14-15-3-17 applies to any "lake" that is a public body of water. IC 14-15-3-17 does not apply exclusively to the "public freshwater lakes" that are governed by the Lake Preservation Act. To be sure, public freshwater lakes are public bodies of water subject to the Boating Code. But other public lakes are also subject to the Boating Code. For examples, these include Lake Michigan, Monroe Lake, and Wolf Lake in Lake County, none of which is a public freshwater lake. Not until 2000 did the legislature determine that the regulation of boating operations under the Boating Code should be coordinated with the administration of the public trust under Lake Preservation Act. See, now, IC 14-26-2-23(c)(4). The Commission has sought to coordinate licensure activities pertaining to marker buoys through rules at 312 IAC 11-3 and 312 IAC 5-4.

Applying the argument contrary to the Claimants, the language of the Lake Preservation Act is not less but rather more specific than the language of the Boating Code. The Boating Code applies to all public waters, and IC 14-15-3-17 applies to all public waters that are lakes. But the Lake Preservation Act applies to a smaller set of public lakes than does the Boating Code. The Lake Preservation Act applies only to "public freshwater lakes".

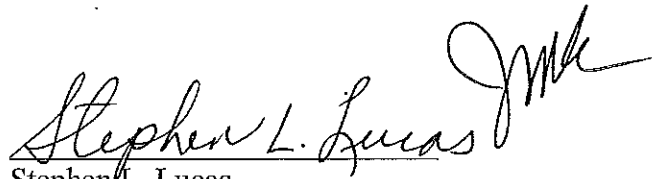
Resolution of these arguments is a matter upon which reasonable persons may differ. But the resolution should not follow a motion to index an agreed order in CADDNAR. The resolution deserves serious analyses, and not merely an interpretation derived from general language in an agreed order. In effect, the "Agreed Order" in this proceeding provided the Claimants with site-specific individual permits. Under Information Bulletin #1, it provided no more. Under the application of IC 4-215-3-32 and IC 4-21.5-3-27(c), it was required to provide no more.

IC 4-21.5-3-27(c) excludes "negotiated orders" from consideration by an administrative law judge in making final orders under AOPA under IC 13, IC 14, and IC 25. The "Agreed Order" in this proceeding is a "negotiated order" that is excluded from providing a precedent under IC 4-

21.5-3-27(c) and Information Bulletin #1. But the authority which governs Information Bulletin #1 is the Natural Resources Commission. Within the sideboards of law (most notably statutes and rules), the Commission might determine an amendment could be made to Information Bulletin #1 that would allow an administrative law judge and the AOPA Committee to consider an agreed order approved in an unrelated proceeding.

To this end, the hearing officer recommends the AOPA Committee establish a special committee (consisting of AOPA Committee members, Division of Hearings members, and any other persons deemed appropriate) to evaluate and make recommendations to the Natural Resources Commission, as a whole, relative to the Claimants' "Motion to Index Agreed Order". The special committee would reference "Petitions for Rule Change and Nonrule Policy Document Change", Information Bulletin #7 (Third Amendment) as a general guidance in performing the function.

Dated: July 29, 2014



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Captain Gary Whitaker, DNR Division of Law Enforcement